tentions were without foundation. *Brushaber* v. *Union Pacific Railroad Company,* 36 Sup. Ct. 237.

The principal case is the first one decided under the provisions of the Sixteenth Amendment, and is therefore peculiarly important. It cannot intelligently be read without a consideration of the case of *Pollock* v. *Farmers' Loan & Trust Co.,* 157 U. S. 129, 39 L. Ed. 759, 15 Sup. Ct. 673; 158 U. S. 601, 39 L. Ed. 1108, 15 Sup. Ct. 912, where it was held that an income tax should be tested by its results, and as the tax finally falls upon the property from which the income was derived, the tax must, in effect, be a tax upon the property itself; insofar as the tax fell upon either real or personal property it was deemed to be direct within the meaning of the Constitution. It thus appears that an income tax was looked upon as direct because the court looked not to the immediate point at which the tax was levied, but to the source upon which it ultimately fell, and falling in the end on real and personal property, it was direct. In the present case the court suggested that, although from the time of the decision in *Hylton* v. *United States,* 3 Dall. 171, 1 L. Ed. 556, direct taxes were deemed to be only those upon real estate and capitation taxes, yet the result reached in the *Pollock* case that a tax on personal estate was also a direct tax, is not attempted to be disturbed by the Amendment. The Amendment goes rather to the rule laid down in that case which requires the court, in determining whether or not a tax is direct, to look to the source from which the income arises rather than merely stopping with the income itself. The Amendment orders the court to look no further than the income itself and to disregard the source from which the income is derived. Income taxes are not by the Amendment taken from the class of direct taxes, but the Amendment prevents the operation of a rule which had removed that type of taxation from the class of excise taxes to that of direct taxes, viz., the rule of looking to the ultimate source.

CONSTITUTIONAL LAW.—POWER OF COMMISSIONER TO PUNISH A WITNESS.—X was appointed commissioner by a New York court to take the testimony of A and B in Ohio for a cause pending in New York. A and B refused to be sworn as witnesses, and X, finding their testimony necessary, ordered them imprisoned for contempt. A and B applied for a writ of habeas corpus, claiming that the Ohio statute authorizing such commitment by a commissioner of a sister state was unconstitutional because it allowed the exercise of judicial power by one not a member of the judicial department of the State of Ohio. *Held,* that the statute was constitutional, since the power conferred on the commissioner to commit to jail for refusing to testify is not judicial in the sense of the Constitution conferring all judicial power upon the courts of the state. *Benckenstein* v. *Schott* (Ohio 1916), 110 N. E. 633.

It is interesting to note that the instant decision is in conflict with the law in New York, so a commissioner appointed in Ohio to take testimony in New York cannot punish for contempt, while if appointed in New York to act in Ohio he may do so. *People ex rel. Macdonald* v. *Leubischer,* 54

N. Y. Supp. 869. The New York court entertains the view that the power of an officer in taking depositions to commit for contempt is judicial in its nature. That the power to punish for contempt can be exercised by non-judicial tribunals and is not judicial in its nature as that word is used in the Constitution is undoubtedly the weight of authority; and the present case is in accordance with the better view. *DeCamp* v. *Archibald,* 50 Oh. St. 618; *Ex parte Jennings,* 60 Oh. St. 319, 54 N. E. 262; *Burtt* v. *Pyle,* 89 Ind. 398; *In re Huron,* 58 Kan. 152; *Ex parte McKee,* 18 Mo. 599; *Coleman* v. *Roberts,* 133 Ala. 323; contra, *Burns* v. *San Francisco Super. Ct.,* 140 Cal. 1.

CONTRACTS—EXCUSE FOR DELAY IN PERFORMANCE.—The Carnegie Steel Company contracted with the United States Government to manufacture armor-plate for the Ordnance Department in accordance with specifications contained in the contract. The contract provided for deductions from contract price for delay, but that some delays might be excused, viz., those which the Chief of Ordnance might determine to have been due to "unavoidable causes, such as fires, storms, labor strikes, actions of the United States, etc." It was found by the Carnegie Company, after it had commenced to manufacture the armor plate, that the process which it had supposed adequate for its production was in fact inadequate, and considerable delay was occasioned in experimenting before the proper process was discovered. The Government deducted for the delay and the Carnegie Company sued to recover the amount deducted, claiming that the cause of delay was "unavoidable" within the meaning of the clause above mentioned. The Goverment demurred to the petition. *Held*: Demurrer should be sustained. The cause of the delay was not one provided for, and was inexcusable. *Carnegie Steel Co.* v. *United States,* 240 U. S. 156, 36 Sup. Ct. 342.

The case is interesting because of the novelty of the contention of the plaintiff that because the ignorance under which it labored as to the inadequacy of the process was an ignorance shared by the whole world, the delay was unavoidable. The argument seems to have been that since this was the first attempt ever made to manufacture this kind of armor plate, and since it was reasonable to assume that the process they expected to use was a sufficient one, they contracted under a mistaken belief which fell within the class provided for as "unavoidable causes." The answer made by the court to this contention is that, though the ignorance was world-wide, it was an ignorance which might have been dispelled by proper experimenting before the contract was entered into, and the cause of delay was therefore avoidable. The rule followed is the well established one laid down in the case of *The Harriman,* 9 Wall. 161, 172, 19 L. Ed. 629, 633, that, "if what is agreed to be done is possible and lawful it must be done. Difficulty or improbability of accomplishing the undertaking will not avail the defendant." The principle is the same as that applied in excuses for non-performance. If the parties have not stipulated that the cause which has operated to prevent performance or to cause delay shall